LAI MOO NUI & ORS

v.

MAHEENDRAN VKN PILLAY

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL SUIT NO: S5-22-251-1999]
20 DECEMBER 2006

CIVIL PROCEDURE: *Judgment - Setting aside - Application made under O. 42 r. 13 Rules of the High Court 1980 - Whether not appropriate provision - Rules of the High Court 1980, O. 35 r. 1(2), 2*

CIVIL PROCEDURE: *Judgment - Setting aside - Grounds for - Withdrawal of solicitor - Failure to give instructions to solicitor - Whether unable to proceed - Whether action correctly dismissed*

CIVIL PROCEDURE: *Judgment - Setting aside - Grounds for - Failure to appear in court - Whether unable to proceed*

CIVIL PROCEDURE: *Solicitor - Counsel appearing in court - Failure to proceed due to lack on instructions from client - Whether reasonable*

LEGAL PROFESSION: *Practice of law - Appearance in court - Failure to proceed due to lack on instructions from client - Whether reasonable*

LEGAL PROFESSION: *Duty of care - Appearance in court - Failure to proceed due to lack on instructions from client - Whether reasonable*

CIVIL PROCEDURE: *Judgment - Setting aside - Procedure - Whether proper and correct procedure was to file appeal instead of application to set aside judgment*

This was an application by the plaintiffs under O. 42 r. 13 of the Rules of the High Court 1980 ('RHC') to set aside this court's judgment dated 2 January 2003 dismissing the plaintiffs' suit. When the case was called up for hearing on 2 January 2003, the plaintiffs' solicitor explained to the court that his clients had not given him any instructions even though they had been informed of the hearing. Further, the plaintiffs' solicitor informed the court that he had intended to withdraw as solicitor for the plaintiffs, but was instructed by the court to appear on the date of the hearing for determination of the suit and also to hear the defendant's counterclaim. The defendant's solicitor, who was present together

with the defendant, invoked O. 35 r. 1(2) of the RHC and requested that the plaintiffs' claim be dismissed. On the basis of the evidence before the court and the absence of a challenge thereof, the defendant was found to have proven its case on the counterclaim. The plaintiffs, in the present application, submitted that their failure to appear on 2 January 2003 was because of their former solicitor's representation, prior to the hearing date, that it would discharge itself as solicitor in the conduct of the matter and, by reason thereof, the plaintiffs were told not to appear in respect of any matter pertaining to this action pending the disposal of the application to discharge.

Held (dismissing the plaintiffs' application):

(1) The order of the court was made under O. 35 r. 1(2) of the RHC and in light of the specific provision in O. 35 r. 2 of the RHC for orders made under O. 35 of the RHC, the general provision in O. 42 r. 13 of the RHC was not the appropriate provision for the present application. On this ground, it must fail. (paras 14 & 15)

(2) If it were true that their solicitor intended to discharge itself, it would be all the more reason the plaintiffs should appoint replacement solicitors to appear or to appear themselves. To leave further conduct of a matter to lawyers who were withdrawing from further representation was most unusual and not credible. There was also no sign of any action against their alleged previous solicitor since if their allegation were true, the solicitor had misled the court about seeking but not receiving communication or instructions. Nor was there an affidavit from their previous solicitor to confirm having so advised the plaintiffs. (para 18)

(3) From the notes of evidence, it was clear that the solicitor for the plaintiffs had appeared and was given the opportunity to proceed for the plaintiffs. He told the court he was unable to do so because he had no instructions from the plaintiffs. Since the action being tried was that of the plaintiffs, the plaintiffs must be ready to proceed on the date of trial. No solicitor for a plaintiff can give the excuse of seeking instructions as a reason for not being able to proceed since when a solicitor filed the writ of summons and the statement of claim, he had instructions to proceed according to the pleaded case and to obtain judgment thereon as soon as possible. He requires no

further instructions unless it is in respect of something new raised by the other party. The solicitor did not clarify in respect of what aspect he required instructions. There was nothing, therefore, to be considered on the question of being unable to proceed. Since the plaintiffs did not proceed on the day set down for trial, their action must be dismissed. (para 21)

(4) In respect of the counterclaim, the evidence adduced for the defendant was not challenged and was consistent with the counterclaim. The court had accepted that the defendant had proved its case according to the civil standard and had entered judgment for the defendant as in the order made. The correct and proper procedure would be for the plaintiffs to file an appeal and not an application to set aside the judgment. A notice of appeal had been filed earlier on 29 January 2003 against the judgment. That having been done, the plaintiffs could not go back to the High Court to seek an order to set aside the judgment which had been appealed from. (paras 22 & 23)

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 6, O. 35 rr. 1(2), 2, O. 42 r. 13

For the plaintiffs - Moharmustaqeem Mohammed; M/s Shearn Delamore & Co
Venu Nair; M/s Paul Cheah & Assoc
For the defendant - V Rajadevan (S Murali with him); M/s Rajadevan & Assoc
CV Devan; M/s CV Devan & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Patail J:

Brief Facts And Chronology

Hearing on 2 January 2003.

[1] The plaintiffs' suit was dismissed with costs on 2 January 2003.

[2] The action was fixed for hearing on 2 January 2003. When the case was called up for hearing on that date the solicitor for the plaintiffs explained to the court that his clients have not given

A him any instructions, even though letters pertaining to the above had been sent to his clients. Further the plaintiffs' solicitor informed the court that on the last date, which was fixed for case management, he had intended to withdraw as solicitor for the plaintiffs, but was instructed by the court to appear on the date
B of hearing on 2 January 2003 for determination of the above suit and also to hear the defendant's counter-claim.

[3] The defendant's solicitor was present together with the defendant. The defendant's solicitor informed the court that he is
C invoking O. 35 r. 1(2) of the Rules of the High Court 1980 and requested that the claim against the defendant be dismissed, and the defendant be permitted to proceed with the trial of the counter-claim.

D **[4]** In making the application under O. 35 r. 1(2) aforesaid, the solicitor for the defendant submitted that the case had been fixed earlier for case management and on both dates the plaintiffs had informed this court that they are unable to comply with case management instruction because they could not contact their
E clients. Taking into account that it is the plaintiffs' case, obviously the plaintiffs are not interested in proceeding with this action. Otherwise they would have kept in touch with or responded to their solicitors.

F **[5]** After hearing the submission of learned solicitor on the above issue, the defendant's application was allowed and accordingly ordered the striking out of the plaintiffs' claim with costs.

G **[6]** In respect to the defendant's counter-claim, the court ordered the defendant to proceed with the trial of the counter-claim. The defendant took the stand and testified on oath in respect of his claim.

H **[7]** The evidence adduced revealed that the plaintiffs entered into a sale and purchase agreement with defendant on 20 March 1995, wherein the plaintiffs agreed to buy from the defendant the house which they were currently renting.

I **[8]** The plaintiffs paid the 10% deposit and the balance of the purchase price within 90 days from the date of signing the agreement. Several extensions of time were given to the plaintiffs to pay the differential sum and also the balance purchase price,

but plaintiffs failed to pay the said sum. Finally on 25 April 1996, the defendant terminated the said agreement and forfeited the deposit against the plaintiffs.

[9] The defendant in their counter-claim is claiming from the plaintiffs as follows:

(a) Unpaid rental from July 1999 till date of vacant possession;

(b) Double rental from date of notice, July 1999 to date of vacant possession; and

(c) Vacant possession.

[10] The plaintiffs' solicitor had no reply to the defendant's submissions. He repeated his earlier statement that he had no instructions from his clients.

[11] On the basis of the evidence before the court, and absence of challenge to the evidence adduced in the trial, the court found that the defendant has proven its case on the counter-claim and accordingly entered judgment for the defendant.

[12] The defendant in their submission informed the court they were not proceeding further against the 2nd and 3rd plaintiffs. The counter-claim against the 2nd and 3rd plaintiffs was dismissed with no order as to costs.

Plaintiff's Summons In Chambers Of 24-2-2004 (encl. 48)

[13] The plaintiffs, thereafter, made an application by way of summons in chambers dated 24 February 2003 under O. 42 r. 13 of the Rules of the High Court for the following orders:

a) That the judgment of this Honorable Court dated 2 January 2003 be set aside and that the plaintiffs' claim herein be reinstated and heard afresh;

b) That the execution and/or any other forms of enforcement of the said judgment be stayed pending the final disposal of the application and/or until further order of this application;

c) That the costs of this application be made costs in the cause;

d) Such other reliefs and orders as the court thinks fit.

[14] The order of the court was made under O. 35 r. 1(2). There is specific provision in O. 35 r. 2 that:

> (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party on such terms as it thinks just.
>
> (2) An application under this rule must be made within 7 days after the trial.

[15] In the light of the specific provision in O. 35 r. 2 for orders made under O. 35, the general provision in O. 42 r. 13 is not the appropriate provision for the present application. On this ground it must fail.

[16] The grounds as now advanced by the plaintiffs in support of their application, as deducible from the affidavits filed herein, can be summarized as follows:

> That the failure of the Plaintiffs to appear on the 2nd January 2003 was because of the representation made by their former solicitors both orally and in writing prior to the hearing date that they will discharge themselves as solicitors in the conduct of the matter and by their reason thereof the Plaintiff was told not to appear in respect of any matter pertaining to this action, including in this Court, pending the disposal of the aforesaid application to discharge.

[17] It is alleged by the second plaintiff that on 8 December 2002 she had called up their former solicitor's office and spoke to the secretary who informed her in response to her queries that she need not appear in court until the discharge of her former solicitors. The plaintiffs in her affidavit further stated that they did not receive any further correspondence from their solicitors until 6 January when they were informed that their claim has been dismissed with cost and that on the case management date on 27 December 2002, the Managing Judge, Justice Dato' James Foong J (as he then was) had directed that their former solicitors to proceed with the case and not discharge themselves. The plaintiffs maintained that the reason for them not appearing on the hearing date was that they did not receive any communication or notification from their solicitors to attend court.

[18] If it were true their solicitors intended to discharge themselves, it would be all the more reason the plaintiffs should appoint replacement solicitors to appear, or appear themselves. To leave further conduct of a matter to lawyers who are withdrawing from further representation is most unusual. That they would rely as suggested above upon the solicitors who would be withdrawing is, therefore, not credible. There is also no sign of any action against their alleged previous solicitors since if their allegation is true, the solicitors had misled the court about seeking but not receiving communication or instructions. Nor is there an affidavit from their previous solicitors to confirm having so advised the plaintiffs.

[19] The learned solicitor for the plaintiffs in their submission argued that a judgment based on O. 35 r. 1(2) is an *ex parte* judgment and further gave an analogy that such judgment or orders are equivalent to those obtained without regard to merits of the case. The learned solicitor for the defendant in return submitted that judgment recorded for the defendant's counter-claim is not an *"ex parte"* order, as the defendant gave evidence in open court and further the matter was heard not in chambers but open court, and the term *"ex parte"* applies only for judgment made in chambers (O. 32 r. 6 RHC 1980).

[20] The date on which judgment was entered against the plaintiffs was fixed for full trial. The plaintiffs' solicitor was present in court. Order 35 r. 2(1) provides:

> Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.

[21] From the notes of evidence it is clear that the solicitor for the plaintiffs had appeared and was given the opportunity to proceed for the plaintiffs. He told the court he was unable to do so because he had no instructions from the plaintiffs. Since the action being tried was that of the plaintiffs, then the plaintiffs must be ready to proceed on the date of trial. No solicitor for a plaintiff can give the excuse of seeking instructions as a reason for not being able to proceed, since when a solicitor filed the writ of summons and the statement of claim, he had instructions to proceed according to the pleaded case, and to obtain judgment thereon as soon as possible. He requires no further instructions unless it is in respect of something new raised by the other party.

A The solicitor did not clarify in respect of what aspect he required instructions. There was nothing, therefore, to be considered on the question of being unable to proceed. Since the plaintiffs did not proceed on the day set down for trial, their action must be dismissed with cost.

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[22] In respect of the counter-claim, trial of the counter-claim proceeded. Solicitor for the plaintiffs was present. He did not proceed with defending against the counter-claim because, he said, he had no instructions. The defendant proceeded with the trial of C the counter-claim and produced his witness. The witness was offered for cross-examination, but was not cross-examined by the plaintiffs' solicitor, who said he had no instructions. The evidence adduced for the defendant was not challenged. It was consistent with the counter-claim. The court accepted that the defendant D had proved its case according to the civil standard, and entered judgment for the defendant as in the order made.

[23] The correct and proper procedure would, in the circumstances for the plaintiffs, to file an appeal and not an application to set aside the said judgment. A notice of appeal had E been filed earlier on 29 January 2003 against the judgment. That having been done the plaintiffs cannot go back to the High Court to seek an order to set aside the judgment which had been appealed from.

F **[24]** For the reasons above, the application at encl. 48 was dismissed with cost.

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